IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 56 of 2007
With
CIVIL APPLICATION No. 2412 of 2007
In
APPEAL FROM ORDER No. 56 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GULAMABBAS GULAMNABI SHAIKH AND ANOTHER
Versus
MUMTAZKHAN KHUDABUX AND OTHERS

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Appearance :
MR H.S.MULIA for Appellants.
MR MOHD.HANIF SHAIKH for Respondent No.1.
None for Respondent No.2.
NOTICE SERVED BY DS for Respondent Nos.2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.5,2.2.6 - 3, 5.
DS AFF.NOT FILED (N) for Respondent No.4.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 07/03/2007

ORAL JUDGMENT

Mr.Mulia, learned advocate for the appellants request that except respondent no.1, he may be permitted to delete rest of the respondents from the present proceedings, as the impugned order is passed in favour of respondent no.1 only, who is the original plaintiff in the suit.

2) Permission to delete names of the respondents, except respondent no.1, is granted. Accordingly, names of respondents no.2 to 5 stands deleted from the present proceedings.

3) As per the order of this Court dated 2-3-2007, this matter is kept for final disposal at admission stage, however, today formal order of admission is passed. **ADMIT**. Learned advocate, Mr.Mohd.Hanif Shaikh waives service of admission on behalf of respondent no.1.

4) Heard Mr.Mulia, learned advocate for the appellants as well as Mr.Mohd.Hanif Shaikh, learned advocate for respondent no.1.

5) The plaintiff has filed Special Civil Suit No.148/2003 for specific performance of the suit agreement. In the aforesaid suit, case of the plaintiff is that on 11-12-2000 the original land owners have executed an agreement to sell in connection with the suit property, which is described in paragraph 1 of the plaintiff, and part consideration is also paid. Inspite of that, defendants no.1 to 4 have published a notice, on the basis of which the plaintiff came to know that defendants no.1 to 4 have got false power of attorney in their favour and defendant no.5 has executed sale deed dated 2-5-2002, by which the rights of the plaintiff are affected. On these and such other grounds, suit is filed by the plaintiff with a prayer to pass decree for specific performance and to set aside the sale deed executed in favour of defendant no.6.

6) In the aforesaid suit, an injunction application was pressed into service by the plaintiff. While deciding injunction application, it is found by the learned trial Judge that prima facie case is in favour of the plaintiff while balance of convenience is in favour of defendant no.6, as there is a sale deed in favour of defendant no.6. While disposing of aforesaid injunction application, learned trial Judge has directed both the parties to maintain status quo during the pendency of the suit. In my view, it is a mandate of law that before granting interim injunction under Order 39, prima facie case and balance of convenience should be there in favour of the party and, simply because the suit is filed, is not a ground for granting injunction.

7) Mr.Mohd.Hanif Shaikh, learned advocate for respondent no.1 submitted that balance of convenience is also in favour of present plaintiff, and to raise that contention the plaintiff has also preferred an appeal before this Court, however, said appeal is disposed of with a liberty to the plaintiff to address the Court even on the question of balance of convenience in the present appeal.

8) At the time of hearing of this appeal, it is agreed between the parties that it would be just and proper to remand the matter to the trial Court to pass fresh order on Exh.5 application after considering entire evidence on record and to record finding on prima case and balance of convenience.

9) In view of the consensus prevailing between the parties, it is not necessary to give detailed reasons while deciding this appeal and the matter is remanded to the trial Court to give specific finding on balance of convenience and prima facie case and also to consider whether injunction is required to be granted or not. Accordingly, impugned order

of the trial Court is set aside and the trial Court is directed to decide Exh.5 application *de-novo* without being influence by the observations made earlier at the time of deciding Exh.5 application or the observations made by this Court in this order. After considering the entire material and evidence on record, the trial Court may give appropriate finding on balance of convenience and prima facie case. The trial Court may dispose of Exh.5 application within a period of three months from the date of receipt of writ from this Court.

10) Subject to what is stated herein above, this Appeal from order is disposed of with no order as to costs.

11) In view of above order on main appeal, no order on Civil Application No.2412 of 2007.

(P.B.Majmudar, J.)

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